

\*\*Original filed 9/26/06\*\*

NOT FOR CITATION  
IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Plaintiff, a state prisoner proceeding pro se, filed a civil rights complaint under 42 U.S.C. § 1983, which the Court dismissed with leave to amend. Plaintiff then filed an amended complaint, and the Court ordered service of Plaintiff's claims against state prison employees for the use of excessive force, the failure to provide procedural protections at a disciplinary hearing, and deliberate indifference to Plaintiff's serious medical needs. Defendants have filed a motion for summary judgment with respect to all claims and a motion to dismiss the medical claim as unexhausted. Plaintiff has filed an opposition to Defendants' motions and a cross-motion for summary judgment.

Order Denying Defendants' Motion to Dismiss, Granting Defendants' Motion for Summary Judgment, Denying Plaintiff's Cross-Motion for Summary Judgment, Addressing Pending Motions  
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1 Defendants have filed a reply. This order addresses the dispositive motions as well as  
2 Plaintiff's pending procedural motions.

3 **BACKGROUND**

4 Plaintiff raises three claims for relief. In the first claim he alleges that on May 25,  
5 2001, while he was being held at San Quentin State Prison (SQSP) on a lay-over from  
6 Pelican Bay State Prison (PBSP) en route to a court appearance, Defendant Russell, the  
7 SQSP Receiving & Release officer, used excessive force against him.

8 In the second claim Plaintiff alleges that on September 5, 2001 Defendant  
9 Carmichael, a PBSP hearing officer, found him guilty of battery on Defendant Russell at  
10 a disciplinary hearing which did not meet the requirements of due process. As a result,  
11 Plaintiff was sentenced to a term of three years in the Segregated Housing Unit (SHU).  
12 Plaintiff also alleges that Defendant Schwartz, an associate warden at PBSP, wrongly  
13 denied his administrative appeal of the hearing.

14 In the third claim Plaintiff alleges that Defendant McLoughlin – a dental assistant  
15 at PBSP, Defendant Spencer – a dentist at PBSP, and Defendant Winslow – the Health  
16 Care Manager at PBSP, acted with deliberate indifference to his serious medical needs  
17 from April through July of 2003 by failing to provide him with adequate dental care.

18 **DISCUSSION**

19 A. Standard of Review

20 Summary judgment is proper where the pleadings, discovery and affidavits  
21 demonstrate that there is "no genuine issue as to any material fact and that the moving  
22 party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Material facts are  
23 those which may affect the outcome of the case. Anderson v. Liberty Lobby, Inc., 477  
24 U.S. 242, 248 (1986). A dispute as to a material fact is genuine if there is sufficient  
25 evidence for a reasonable jury to return a verdict for the nonmoving party. Id.

26 The party moving for summary judgment bears the initial burden of identifying  
27 those portions of the pleadings, discovery and affidavits which demonstrate the absence

1 of a genuine issue of material fact. Celotex Corp. v. Cattrett, 477 U.S. 317, 323 (1986).  
 2 Where the moving party will have the burden of proof on an issue at trial, it must  
 3 affirmatively demonstrate that no reasonable trier of fact could find other than for the  
 4 moving party. But on an issue for which the opposing party will have the burden of proof  
 5 at trial, the moving party need only point out "that there is an absence of evidence to  
 6 support the nonmoving party's case." Id. at 325.

7 Once the moving party meets its initial burden, the nonmoving party must go  
 8 beyond the pleadings and, by its' own affidavits or discovery, "set forth specific facts  
 9 showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). The nonmoving  
 10 party has the burden of identifying, with reasonable particularity, the evidence that  
 11 precludes summary judgment. Keenan v. Allen, 91 F.3d 1275, 1279 (9th Cir. 1996). If  
 12 the nonmoving party fails to make this showing, "the moving party is entitled to judgment  
 13 as a matter of law." Celotex, 477 U.S. at 323.

14 When the parties file cross-motions for summary judgment, the district court must  
 15 consider all of the evidence submitted in support of both motions to evaluate whether a  
 16 genuine issue of material fact exists precluding summary judgment for either party. The  
 17 Fair Housing Council of Riverside County, Inc. v. Riverside Two, 249 F.3d 1132, 1135  
 18 (9th Cir. 2001).

19 B. Excessive Force Claim

20 1. Facts

21 Plaintiff alleges that Defendant Russell used excessive force against him.  
 22 The facts pertinent to this claim are taken from the verified pleadings, declarations and  
 23 supporting documents submitted by the parties in support of and in opposition to  
 24 Defendants Russell's motion for summary judgment and Plaintiff's cross-motion for  
 25 summary judgment.

26 Plaintiff's Facts:

27 On May 24, 2001 Plaintiff traveled on a prison bus from PBSP for a court

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1 appearance. En route, there was an overnight layover at SQSP. Plaintiff alleges that  
 2 when the bus arrived at SQSP, Defendant Russell, the Receiving & Release (R&R)  
 3 officer at SQSP, was yelling insults at and shoving the inmates getting off the bus,  
 4 although Plaintiff was not shoved.

5 The next morning Plaintiff arrived at R&R to board the bus. He noticed that  
 6 Defendant Russell was handling prisoners roughly and shoving them. Plaintiff was  
 7 placed in a padlocked cell until it was his turn to board the bus. When his turn came, an  
 8 officer told Defendant Russell that Plaintiff needed to be strip-searched and handcuffed  
 9 while still in the cell because he was from the SHU at PBSP. However, Defendant  
 10 Russell responded in strong terms that he didn't care, and said that he would "beat  
 11 [Plaintiff's] skinny ass if he give me any lip." Defendant Russell opened the cell door,  
 12 which Plaintiff exited without restraints. Defendant Russell then asked Plaintiff what he  
 13 was holding in his hands. Plaintiff explained that it was a pair of thermal underwear  
 14 which the bus driver had allowed him to bring because the cell windows were missing at  
 15 the prison where Plaintiff was headed. Defendant Russell swore at Plaintiff and told him  
 16 to "face the screen." Defendant Russell then said that he was going to throw the thermal  
 17 underwear away. Plaintiff asked him to confirm with the bus driver that he was allowed  
 18 to have the thermal underwear. Instead, Defendant Russell threw the thermal underwear  
 19 in the trash.

20 Plaintiff, who was three feet away from the cell unit door, then took one step  
 21 toward the door and yelled to the bus driver. At that point, Defendant Russell grabbed  
 22 Plaintiff by the neck violently and gave him a hard push, which caused Plaintiff to fall  
 23 outside of the door frame. Seven or eight other officers then jumped on Plaintiff.  
 24 Defendant Russell sat on top of Plaintiff with his knee in Plaintiff's back, holding  
 25 Plaintiff's head and violently pulling it back and forth. Before he let Plaintiff up,  
 26 Defendant Russell stomped on Plaintiff's right hand. As a result of Defendant Russell's  
 27 actions, Plaintiff suffered a gash on his right hand, for which he received a butterfly stitch

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1 and band-aids, and a large bump on his head.

2 Plaintiff filed a staff complaint requesting an investigation into Defendant  
 3 Russell's behavior. The official complaint process was initiated by personnel at SQSP by  
 4 way of a staff misconduct review sheet dated June 8, 2001. (Pl.'s Ex. B-108.) On June  
 5 20, 2002 Plaintiff received notice from E. DeRusha, a Correctional Counselor I, that he  
 6 had spoken with a sergeant at SQSP who had told him that the "investigation should not  
 7 have taken so long," and that it had been completed "2 months ago," but Plaintiff had not  
 8 been notified. (Pl.'s Ex. E-200.) DeRusha provided Plaintiff with a copy of the  
 9 memorandum from the Employee Relations Officer at SQSP which stated that Plaintiff's  
 10 complaint that "a San Quentin staff member was less than professional when dealing with  
 11 you" had been sustained, that is, that the investigation had found "a preponderance of  
 12 evidence to prove the allegations[] made in the complaint," and that appropriate  
 13 administrative action had been taken. (Pl.'s Ex. C).

14 Defendant's Facts:

15 On May 25, 2001, at approximately 11:15 a.m., Defendant Russell was working  
 16 his assignment as a R&R officer at SQSP. Along with another officer he was loading  
 17 inmates onto a bus, designated as CDC Bus Schedule "T."

18 Defendant Russell escorted Plaintiff from the holding cell located at the front of  
 19 the R&R area to the search area, near the unit's front door. He attempted to conduct an  
 20 unclothed body search of Plaintiff. To do this, he ordered Plaintiff to "strip out," meaning  
 21 to remove his clothing. Plaintiff did not comply with this direct order. Instead, Plaintiff  
 22 turned and fled out the front door of R&R.

23 To prevent Plaintiff from fleeing to the outside area (the lower yard at SQSP),  
 24 Defendant Russell attempted to place his left hand on Plaintiff's left elbow. In response,  
 25 Plaintiff slapped Defendant Russell's left hand away with his right hand. Plaintiff ran  
 26 away from Defendant Russell, down nearby steps, and turned toward Defendant Russell.  
 27 Plaintiff swung his right closed fist at Defendant Russell's chest area, but failed to make

1 contact. In so doing, however, Plaintiff turned and exposed his right back and shoulder  
 2 area to Defendant Russell.

3       Concerned with his own safety and the safety of the prison, Defendant Russell  
 4 placed his right hand on Plaintiff's right arm and placed his left hand on Plaintiff's back  
 5 and shoulder area. Using both hands, Defendant Russell pushed Plaintiff to the ground to  
 6 subdue him and to prevent him from attempting to strike Defendant Russell. At no time  
 7 did Defendant Russell strike Plaintiff with a closed fist.

8       Once Plaintiff was on the ground, several other officers arrived to assist with  
 9 restraining Plaintiff and to secure him in handcuffs. Plaintiff ceased struggling and  
 10 Defendant Russell placed him in handcuffs. Once Plaintiff was in handcuffs, Defendant  
 11 Russell assisted him to a standing position and released him to another officer who  
 12 escorted him to a holding cell.

13       Plaintiff was taken to the infirmary and seen by an MTA, who wrote on the  
 14 medical report that, "Inmate has lacerations on knuckles of middle two fingers of L hand.  
 15 No other injuries." (Defs.' Ex. A, AGO 0006.) According to the report, the injuries were  
 16 cleaned and dressed with hydrogen peroxide and band-aids, and Plaintiff was released  
 17 from the infirmary. (*Id.*)

18       2.     Applicable Law

19       The treatment a prisoner receives in prison and the conditions under which he is  
 20 confined are subject to scrutiny under the Eighth Amendment. Helling v. McKinney, 509  
 21 U.S. 25, 31 (1993). "After incarceration, only the unnecessary and wanton infliction of  
 22 pain . . . constitutes cruel and unusual punishment forbidden by the Eighth Amendment."  
 23 Whitley v. Albers, 475 U.S. 312, 319 (1986) (ellipsis in original) (internal quotation  
 24 marks and citation omitted).

25       "[W]henever prison officials stand accused of using excessive physical force in  
 26 violation of the Cruel and Unusual Punishment Clause, the core judicial inquiry is . . .  
 27 whether force was applied in a good-faith effort to maintain or restore discipline, or

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1 maliciously and sadistically to cause harm." Hudson v. McMillian, 503 U.S. 1, 6-7  
 2 (1992); see Whitley, 475 U.S. at 320-21; Jeffers v. Gomez, 267 F.3d 895, 912-13 (9th Cir.  
 3 2001). In determining the nature of the use of force, a court may evaluate the need for  
 4 application of force, the relationship between that need and the amount of force used, the  
 5 extent of any injury inflicted, the threat reasonably perceived by the responsible officials,  
 6 and any efforts made to temper the severity of a forceful response. Hudson, 503 U.S. at  
 7 7.

8 It is not necessary that a prisoner have suffered significant injury in order to  
 9 prevail on an Eighth Amendment claim for use of excessive force. Id. at 9.  
 10 Contemporary standards of decency are always violated when prison officials maliciously  
 11 and sadistically use force to cause harm whether or not significant injury is evident. Id.  
 12 However, the scope of the Eighth Amendment is not without limitation: The Eighth  
 13 Amendment necessarily excludes from constitutional recognition de minimis uses of  
 14 force, provided that the use of force is not of a sort repugnant to the conscience of  
 15 mankind. Id. at 9-10. Although a prisoner may believe that his rights were violated, "not  
 16 every push or shove . . . violates [his] constitutional rights." Id. at 9 (internal quotation  
 17 marks and citation omitted).

18 \_\_\_\_\_ 3. Analysis

19 The Court finds that Plaintiff has raised a genuine issue of triable fact regarding  
 20 whether Defendant Russell used excessive force against him in violation of the Eighth  
 21 Amendment. As conceded by Defendant, it is undisputed that force was used. The  
 22 question then becomes whether the use of force was malicious and sadistic. Applying the  
 23 criteria set out in Hudson, the material facts relevant to such a determination are clearly in  
 24 dispute. Plaintiff alleges that Defendant Russell knew there was no need to use force but  
 25 nevertheless used an amount of force intended to cause injury. Defendant Russell alleges  
 26 that Plaintiff disobeyed a direct order, attempted to flee, and resisted attempts to be  
 27 restrained, thereby requiring Defendant Russell to use a sufficient amount of force to

1 subdue and handcuff Plaintiff. Plaintiff alleges that he suffered more than de minimis  
 2 injury as a result of the use of force. Defendant Russell claims Plaintiff suffered nothing  
 3 more than minor lacerations. In short, Plaintiff alleges facts which, if found to be true,  
 4 show that Defendant Russell applied force maliciously and sadistically for the very  
 5 purpose of causing harm, and Defendant Russell alleges facts which, if found to be true,  
 6 show that he applied force in a good-faith effort to maintain or restore discipline.  
 7 Because there are material facts in dispute regarding the intent with which force was  
 8 applied, neither Defendant Russell nor Plaintiff is entitled to judgment as a matter of law  
 9 on this claim.

10       4.     Qualified Immunity

11       Defendant Russell argues that even if the underlying facts are in dispute as to  
 12 whether he acted with the requisite intent to establish an Eighth Amendment violation, he  
 13 is entitled to qualified immunity.

14       The defense of qualified immunity protects "government officials . . . from liability  
 15 for civil damages insofar as their conduct does not violate clearly established statutory or  
 16 constitutional rights of which a reasonable person would have known." Harlow v.  
Fitzgerald, 457 U.S. 800, 818 (1982). Claims of qualified immunity require a two-step  
 18 analysis. First, the court must consider whether the fact alleged, taken in the light most  
 19 favorable to the party asserting the injury, show that the defendant's conduct violated a  
 20 constitutional right. Saucier v. Katz, 533 U.S. 194, 201 (2001). If the allegations do not  
 21 establish the violation of a constitutional right, there is no necessity for further inquiries  
 22 concerning qualified immunity. Id. If the allegations could make out a constitutional  
 23 violation, however, the court must then ask whether the right was clearly established –  
 24 that is, whether "it would be clear to a reasonable officer that his conduct was unlawful in  
 25 the situation he confronted." Id. at 202. If an officer makes a reasonable mistake as to  
 26 what the law requires, the officer is entitled to qualified immunity. Id. at 205.

27       The qualified immunity inquiry is separate from the constitutional inquiry for a

1 claimed violation of the Eighth Amendment. Marquez v. Gutierrez, 322 F.3d 689, 692-93  
 2 (9th Cir. 2003) (citing Estate of Ford v. Caden, 301 F.3d 1043, 1053 (9th Cir. 2002)  
 3 (extending Saucier to Eighth Amendment claims)). Thus, qualified immunity is not  
 4 precluded where a triable issue of fact exists regarding the defendant's underlying intent.  
 5 Id. In excessive force cases, qualified immunity operates to protect officers from the  
 6 sometimes "hazy border between excessive and acceptable force," Saucier, 533 U.S. at  
 7 206, and will apply if the officer had a mistaken but reasonable belief about the amount of  
 8 force that the law allowed in the situation he confronted, id. at 207-08. See, e.g.,  
 9 Marquez, 332 F.3d at 693 (prison guard entitled to qualified immunity where belief in  
 10 need for use of force was reasonable, even if it was mistaken). The qualified immunity  
 11 analysis does not take "20/20 vision of hindsight" into account, but rather gives deference  
 12 to the judgment of reasonable officers at the time of the occurrence. Graham v. Connor,  
 13 490 U.S. 386, 396 (1989).

14 With respect to the first prong of the qualified immunity analysis, the facts which  
 15 Plaintiff alleges, when viewed in the light most favorable to him, could show that  
 16 Defendant Russell's conduct violated his right under the Eighth Amendment to be free  
 17 from the use of excessive force, as discussed above.

18 The Court next looks to whether this right was clearly established at the time of the  
 19 confrontation. It was. The law defining the contours of the right was first established in  
 20 Whitley v. Albers, where the Supreme Court recognized that security risks in the prison  
 21 setting create a potential for harm to prison staff and inmates alike, and that an additional  
 22 possibility for harm is created for inmates against whom force might be used to quell such  
 23 risks. 475 U.S. at 320. Mindful of the responsibility of prison administrators to avert  
 24 security risks, ensure the safety of prison staff, and take reasonable measures to guarantee  
 25 the safety of inmates, the Court held that any standard for determining whether excessive  
 26 force had been used must "adequately capture the importance of such competing  
 27 obligations, or convey the appropriate hesitancy to critique in hindsight decisions

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1 necessarily made in haste, under pressure, and frequently without the luxury of a second  
 2 chance." Id. The Court concluded that "the question whether [a security] measure taken  
 3 inflicted unnecessary and wanton pain and suffering ultimately turns on whether force  
 4 was applied in a good faith effort to maintain or restore discipline or maliciously and  
 5 sadistically for the very purpose of causing harm." Id. at 320-21 (internal quotation  
 6 marks and citation omitted).

7 In light of the clearly established law in existence at the time of Defendant  
 8 Russell's actions, the sole remaining question is whether it would be clear to a reasonable  
 9 officer standing in his position that his conduct was unlawful in the situation he  
 10 confronted? Accepting Plaintiff's facts as true, see Martin v. City of Oceanside, 360 F.3d  
 11 1078, 1082 (9th Cir. 2004), the Court concludes that it would not be clear to a reasonable  
 12 officer in Defendant Russell's situation that his conduct was unlawful.

13 First, even if he was mistaken about Plaintiff's intent, it would not be unreasonable  
 14 for an officer in Defendant Russell's position to believe that by taking a step toward the  
 15 door Plaintiff was attempting to leave the area without authorization.

16 Second, a reasonable officer in Defendant Russell's position could have concluded  
 17 that he needed to use force in order to prevent Plaintiff from doing so. Defendant Russell  
 18 knew that Plaintiff was not handcuffed (as he should have been) and that he was a  
 19 maximum security prisoner from the SHU at PBSP, the most restrictive of prison  
 20 facilities. Because Plaintiff and Defendant Russell had just engaged in a somewhat  
 21 heated exchange pertaining to Defendant Russell's authority to throw out Plaintiff's  
 22 thermal underwear, Defendant Russell also could have reasonably concluded that Plaintiff  
 23 might not respond to a verbal command to stop. The security risk posed by a non-  
 24 handcuffed inmate free on the prison yard thus would lead an officer in Defendant  
 25 Russell's position to reasonably believe that he must immediately act to restrain Plaintiff,  
 26 and that pushing Plaintiff to the ground was the fastest and safest way to do so.

27 Third, it was reasonable for Defendant Russell to conclude that even after pushing  
 28

1 Plaintiff down he needed to physically restrain Plaintiff until he was handcuffed, and that  
 2 the safest and most effective way to ensure this was by sitting on Plaintiff with his knee in  
 3 Plaintiff's back.

4 Finally, although Defendant Russell's conduct of violently pulling Plaintiff's head  
 5 back and forth and stomping on Plaintiff's hand might seem excessive in hindsight, a  
 6 reasonable officer in Defendant Russell's position could have concluded that in order to  
 7 keep Plaintiff on the ground until he was handcuffed the use of such force was necessary.  
 8 Cf. Watts v. McKinney, 394 F.3d 710, 711-12 (9th Cir. 2004) (gratuitously kicking in the  
 9 groin an inmate who was handcuffed and lying on the cell floor was conduct which no  
 10 reasonable person could believe was constitutional).

11 In sum, based on the facts as alleged by Plaintiff, it was not unreasonable for  
 12 Defendant Russell to believe, even if mistakenly, that Plaintiff was trying to flee and,  
 13 faced with the circumstance of having an non-handcuffed maximum security SHU inmate  
 14 running free on the yard, to use an amount of force which, according to Plaintiff, resulted  
 15 in a gash on his right hand and a bump on his head. Accordingly, qualified immunity is  
 16 GRANTED to Defendant Russell.

17 C. Disciplinary Hearing Claim

18 1. Facts

19 Plaintiff claims that his right to due process was violated by a disciplinary hearing  
 20 at which he was found guilty in absentia after his request to postpone the hearing was  
 21 denied. He also claims that his administrative appeal of this matter was wrongly denied.

22 The following facts are undisputed unless otherwise noted.

23 On May 25, 2001 a rules violation report (RVR) was issued against Plaintiff for  
 24 battery on a peace officer, based on the events which had transpired between Plaintiff and  
 25 Defendant Russell. On July 20, 2001 the RVR was referred to the District Attorney's  
 26 office for a determination whether criminal charges would be brought. On July 31, 2001  
 27 the Marin County District Attorney provided written notice that Plaintiff would not be

1 prosecuted for the May 25, 2001 incident. Defendants assert that Plaintiff was notified of  
 2 the District Attorney's decision on July 31, 2001 as well, and Plaintiff does not dispute  
 3 this fact.

4 On August 30, 2001 Plaintiff received his copy of the RVR. Under CCR § 3320, a  
 5 hearing must be held within thirty days from the date the inmate receives his copy of the  
 6 RVR. Plaintiff claims that upon receiving the RVR he told the officer who gave it to him  
 7 that he wanted to postpone the hearing. Although the grounds upon which he asked for  
 8 postponement are not entirely clear from the content of Plaintiff's pleadings, the copies of  
 9 his administrative appeals which he has attached as exhibits show that he apparently  
 10 sought postponement both because he was waiting for notification on the status of the  
 11 referral to the District Attorney's Office and because he was waiting for a report from the  
 12 Investigative Services Unit, witness statements, and an answer from the Federal Bureau  
 13 of Investigation regarding his allegations that he had been assaulted by Defendant  
 14 Russell.

15 It is undisputed that Plaintiff did not sign the section on the RVR form requesting  
 16 postponement of the hearing pursuant to California Code of Regulations, title 15 (CCR)  
 17 section 3316(c), which provides that an inmate may request postponement of his  
 18 disciplinary hearing pending the outcome of a referral to the District Attorney's Office by  
 19 signing and dating the RVR form. A disciplinary hearing postponed under this section  
 20 must be held within thirty days after written notice is received that the prosecuting  
 21 authority does not intend to prosecute. *Id.* § 3316(c)(1)(C). The form itself shows that  
 22 the box for requesting a postponement is checked, but in the signature section it says  
 23 "refused to sign." (Defs.' Ex. A, AGO 0004.) The reason why Plaintiff's signature isn't  
 24 on the form is not clear. According to Plaintiff's amended complaint, the officer wrote in  
 25 "refused to sign" after telling Plaintiff that it wasn't necessary for him to sign the form at  
 26 that point if the reason for postponement was because he was waiting for an answer from  
 27 the District Attorney's Office. (Compl. at 3-C.) In his administrative appeal on the issue  
 28

1 Plaintiff stated slightly different facts, saying that the officer checked the appropriate  
 2 boxes for postponement and assignment of an investigative employee after telling  
 3 Plaintiff he could postpone the hearing, but Plaintiff then told the officer that, "I would  
 4 sign it at the time of the assignment[.] [S]he said okay but she would put down I refused  
 5 to sign until that time." (Defs.' Ex. A, AGO 0021.) In another variation, in his opposition  
 6 to Defendants' motion for summary judgment Plaintiff states that he did not find out that  
 7 "refused to sign" had been written on the form until some time after the fact. (Opp. at 5.)

8 It is undisputed that on September 5, 2001 Plaintiff was found guilty of the RVR at  
 9 a disciplinary hearing which he did not attend. According to Plaintiff, while he was  
 10 exercising in his cell Defendant Carmichael came to the gate outside of the cell and told  
 11 him that he wanted Plaintiff to attend the disciplinary hearing on the RVR. Plaintiff  
 12 responded that he had postponed the hearing. Defendant Carmichael acknowledged that  
 13 Plaintiff had checked the box on the RVR form asking for postponement but stated that  
 14 he hadn't signed the form and therefore the hearing had to go forward. In his amended  
 15 complaint and his opposition to Defendants' motion for summary judgment, Plaintiff  
 16 states that he told Defendant Carmichael that he needed more time to collect information  
 17 from investigative reports and witnesses. Defendant Carmichael then decided that  
 18 Plaintiff couldn't go to the hearing. In his administrative appeal on the issue Plaintiff put  
 19 the facts a bit differently, stating that he told Defendant Carmichael that he was waiting  
 20 for the District Attorney's Office to finish its investigation of the charges against him, that  
 21 the question whether he had signed the RVR form never came up, and that Defendant  
 22 Carmichael tried to "force" Plaintiff to have the hearing. When Defendant Carmichael  
 23 became "loud and standoffish" Plaintiff states "I said I wanted to postpone and that I was  
 24 going back to the cell because I didn't want any problems." (Defs.' Ex. A, AGO 0021.)  
 25 In both scenarios Plaintiff returned to his cell and Defendant Carmichael found Plaintiff  
 26 guilty of the RVR in absentia. As punishment for the RVR Plaintiff was sentenced to an  
 27 additional three years in the SHU.

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1 Plaintiff appealed the finding of guilt on the ground that the hearing should not  
 2 have gone forward because he had requested postponement. The appeal was denied  
 3 because Plaintiff's refusal to sign the request for postponement rendered it invalid, and  
 4 also because the reason for the postponement request – waiting to hear back from the  
 5 District Attorney's Office – was moot in light of the July 31, 2001 notice declining to  
 6 prosecute.

7       2. Applicable Law

8 Prisoners retain their right to due process subject to the restrictions imposed by the  
 9 nature of the penal system. See Wolff v. McDonnell, 418 U.S. 539, 556 (1974). Prison  
 10 disciplinary proceedings are not part of a criminal prosecution and the full panoply of  
 11 rights due a defendant in such proceedings does not apply. See id. But the Due Process  
 12 Clause requires certain minimum procedural protections where serious rules violations  
 13 are alleged, the power of prison officials to impose sanctions is narrowly restricted by  
 14 state statute or regulations, and the sanctions are severe. See id. at 556-57, 571-72 n.19.

15 \_\_\_\_\_ Wolff established five constitutionally-mandated procedural requirements for  
 16 disciplinary proceedings. First, "written notice of the charges must be given to the  
 17 disciplinary-action defendant in order to inform him of the charges and to enable him to  
 18 marshal the facts and prepare a defense." Id. at 564. Second, "at least a brief period of  
 19 time after the notice, no less than 24 hours, should be allowed to the inmate to prepare for  
 20 the appearance before the [disciplinary committee]." Id. Third, "there must be a 'written  
 21 statement by the factfinders as to the evidence relied on and reasons' for the disciplinary  
 22 action." Id. (quoting Morrissey v. Brewer, 408 U.S. 471, 489 (1972)). Fourth, "the  
 23 inmate facing disciplinary proceedings should be allowed to call witnesses and present  
 24 documentary evidence in his defense when permitting him to do so will not be unduly  
 25 hazardous to institutional safety or correctional goals." Id. at 566. And fifth, "[w]here an  
 26 illiterate inmate is involved . . . or where the complexity of the issues makes it unlikely  
 27 that the inmate will be able to collect and present the evidence necessary for an adequate

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1 comprehension of the case, he should be free to seek the aid of a fellow inmate, or . . . to  
 2 have adequate substitute aid . . . from the staff or from a[n] . . . inmate designated by the  
 3 staff." Id. at 570.

4 In order to meet the minimum requirements of procedural due process outlined in  
 5 Wolff, the findings of a prison disciplinary board also must be supported by some  
 6 evidence. Superintendent v. Hill, 472 U.S. 445, 454 (1985). The relevant question is  
 7 whether there is any evidence in the record that could support the conclusion reached.  
 8 See id.

9 The Due Process Clause requires only that prisoners be afforded those procedures  
 10 mandated by Wolff and its progeny; it does not require that prisons comply with their  
 11 own, more generous procedures. See Walker v. Sumner, 14 F.3d 1415, 1419-20 (9th Cir.  
 12 1994). A prisoner's right to due process is violated "only if he [is] not provided with  
 13 process sufficient to meet the Wolff standard." Id.

14       3.     Analysis

15       a.     Protected liberty interest

16       The placement of a California prisoner in the SHU as a result of disciplinary  
 17 proceedings is subject to Wolff's procedural protections if (1) state statutes or regulations  
 18 narrowly restrict the power of prison officials to impose the punishment, and (2) the  
 19 liberty interest implicated by the punishment is one of "real substance." See Sandin v.  
 20 Conner, 515 U.S. 472, 477-87 (1995).

21       California's regulations concerning discipline provide explicit standards that  
 22 narrowly fetter official discretion. Under these regulations, officials must find that a  
 23 preponderance of the evidence substantiates the charge before guilt may be found and  
 24 punishment assessed. Absent such a finding the inmate may not be placed in isolation nor  
 25 segregation, nor assessed good-time credits. See also CCR § 3320(a) (requiring notice);  
 26 id. § 3320(b) (requiring hearing). Because a prisoner may not be disciplined unless  
 27 explicit substantive and procedural requirements are met, the disciplinary standards and

1 procedures meet the first prong of the Sandin test. See Walker, 14 F.3d at 1419 (finding  
 2 Nevada regulations, which are similar to California's, create liberty interest).

3 A liberty interest of "real substance" under the second prong of the Sandin test will  
 4 generally be limited to freedom from restraint that imposes "atypical and significant  
 5 hardship on the inmate in relation to the ordinary incidents of prison life," Sandin, 515  
 6 U.S. at 484, or from state action that "will inevitably affect the duration of [a] sentence,"  
 7 id. at 487. Because Plaintiff was not assessed a forfeiture of time credits as a result of the  
 8 disciplinary hearing, the question here is whether the disciplinary sentence of three years  
 9 in the highly-restricted PBSP SHU qualifies as an atypical and significant hardship.

10 Typically, placement in segregated housing in and of itself does not implicate a  
 11 protected liberty interest. See Serrano v. Francis, 345 F.3d 1071, 1078 (9th Cir. 2003);  
 12 see, e.g., Sandin, 515 U.S. at 485-86 (inmate's thirty-day placement in disciplinary  
 13 segregation, where conditions mirrored conditions imposed upon inmates in  
 14 administrative segregation and protective custody, did not result in type of atypical,  
 15 significant deprivation for which state might create liberty interest); Mujahid v. Meyer, 59  
 16 F.3d 931, 932 (9th Cir. 1995) (under Sandin no liberty interest when inmate placed in  
 17 disciplinary segregation for fourteen days). However, the circumstances of a particular  
 18 case may sometimes result in segregation working an atypical and significant hardship on  
 19 an inmate so that it does implicate a protected liberty interest. See, e.g., Wilkinson v.  
 20 Austin, 125 S. Ct. 2384, 2394-95 ( 2005) (indefinite placement in Ohio's "supermax"  
 21 facility, where inmates are not eligible for parole consideration, imposes an "atypical and  
 22 significant hardship within the correctional context"); Serrano, 345 F.3d at 1078-79  
 23 (protected liberty interest implicated when wheelchair-assisted inmate was put in a SHU  
 24 not designed for disabled persons, because the placement forced him to endure a situation  
 25 far worse than a non-disabled person sent to the SHU would have to face).

26 Based on the record in the present case, the Court cannot find as a matter of law  
 27 that Plaintiff's placement in the PBSP SHU for three years did not amount to an atypical

1 and significant hardship. However, even if the Court assumes that a protected liberty  
 2 interest was implicated under these circumstances, the Court also finds that Plaintiff's  
 3 right to due process was not violated.

4           b.       Due process

5 Plaintiff claims that Defendant Carmichael's refusal to allow him to postpone his  
 6 hearing until he was able to collect documentation and interview witnesses in support of  
 7 his defense violated his right to a fair hearing.

8       First, Plaintiff claims he was entitled to postponement until the question whether  
 9 the District Attorney's Office would seek criminal prosecution was resolved. This  
 10 argument is without merit, however, because it is undisputed that the question was  
 11 resolved as of July 31, 2001, when the prison and Plaintiff were notified that the District  
 12 Attorney had declined to prosecute. Thus, whether Plaintiff refused to sign the RVR form  
 13 or not, seeking postponement of the hearing on this ground was a moot point by the time  
 14 he was called to attend his disciplinary hearing on September 5, 2001. Accordingly,  
 15 Defendant Carmichael properly denied the request.

16       Plaintiff next claims that he was entitled to a postponement until he had a chance  
 17 to interview witnesses. However, he does not allege that he identified these witnesses for  
 18 Defendant Carmichael, explained what steps he had taken – or would need to take – to  
 19 obtain their testimony, or described the testimony that he anticipated they would give. He  
 20 also does not provide such information here. While Wolff allows an inmate a limited  
 21 right to call witnesses, it is illogical to argue that the right is implicated whenever a  
 22 prisoner asserts that he intends to call unidentified witnesses to present undescribed  
 23 testimony and does not explain how and when he intends to obtain their testimony.  
 24 Accordingly, Defendant Carmichael's refusal to postpone the hearing so that Plaintiff  
 25 could obtain witness testimony did not violate the mandates of Wolff.

26       Plaintiff claims that the hearing should have been postponed until he received the  
 27 results of the staff misconduct investigation he had initiated with respect to Defendant

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1 Russell.<sup>1</sup> As discussed above in the section of this order addressing Plaintiff's excessive  
 2 force claim, Plaintiff filed a staff complaint requesting an investigation into Defendant  
 3 Russell's behavior. The official complaint process was initiated by personnel at SQSP by  
 4 way of a staff misconduct review sheet dated June 8, 2001. (Pl.'s Ex. B-108.) On June  
 5 20, 2002 Plaintiff received notice from E. DeRusha, a Correctional Counselor I, that he  
 6 had spoken with a sergeant at SQSP who had told him that the "investigation should not  
 7 have taken so long," and that it had been completed "2 months ago," but Plaintiff had not  
 8 been notified. (Pl.'s Ex. E-200.) DeRusha provided Plaintiff with a copy of the  
 9 memorandum from the Employee Relations Officer at SQSP which stated that Plaintiff's  
 10 complaint that "a San Quentin staff member was less than professional when dealing with  
 11 you" had been sustained, that is, that the investigation had found "a preponderance of  
 12 evidence to prove the allegations[] made in the complaint," and that appropriate  
 13 administrative action had been taken. (Pl.'s Ex. C.).

14 The Court finds that while the results of the investigative process might well have  
 15 been of benefit to Plaintiff had they been available at the time of his disciplinary hearing,  
 16 Defendant Carmichael's refusal to postpone the hearing until the investigation was  
 17 concluded did not violate Plaintiff's right to due process under Wolff. Although an  
 18 inmate has the right under Wolff to present documentary evidence in support of his  
 19 defense, that right is limited by correctional and institutional concerns. See Wolff, 418  
 20 U.S. at 566. A legitimate correctional concern is the prompt resolution of disciplinary  
 21 charges. Such promptness not only encourages the confidence and cooperation of  
 22 inmates by ensuring that they do not linger under the specter of unresolved allegations  
 23 and that they have the opportunity to mount a defense before memories and witnesses  
 24 fade, it also places a premium on prison administrators' need to punish troublemakers

---

25  
 26 <sup>1</sup>Plaintiff also claims that he was awaiting the results of a complaint he had filed with the  
 27 Federal Bureau of Investigation. However, he has provided no information at all regarding when  
 28 he filed this complaint or its resolution. Accordingly, the Court finds that his claim of an alleged  
 right to postponement on this ground is entirely unsubstantiated and without merit.

1 without undue delay. Thus, while Wolff sanctions the presentation of evidence in an  
 2 inmate's defense, it does not require that inmates be given unlimited time to gather that  
 3 evidence.

4 This is not a case where Plaintiff requested a postponement in order to gather  
 5 documentary evidence which he knew was available but needed more time to obtain (such  
 6 as gathering already-prepared reports or accessing information already in existence in  
 7 prison files). Rather, he knew only that an investigation into his complaint of staff  
 8 misconduct had been initiated at SQSP on June 8, 2001. When the investigation would  
 9 be concluded was wholly outside of Plaintiff's control. And, as the facts show, the  
 10 investigation was not concluded until some time around April 2002 – approximately  
 11 seven months after Plaintiff asked for postponement – and Plaintiff did not learn of the  
 12 results until June 20, 2002. Under these facts, Defendant Carmichael's refusal to allow  
 13 postponement of the hearing until the investigation was completed was not a violation of  
 14 Plaintiff's right to present evidence under Wolff.

15 Finally, Plaintiff claims that because the disciplinary hearing was held in absentia  
 16 Defendant Carmichael's finding of guilt cannot be upheld. However, because Plaintiff  
 17 did not appear at the hearing he did not present any evidence in his defense. Thus, the  
 18 only evidence before Defendant Carmichael was the report prepared by Defendant  
 19 Russell. The sequence of events as alleged by Defendant Russell is set forth in detail in  
 20 the section of this order addressing Plaintiff's excessive force claim. The facts are more  
 21 than sufficient to meet the "some evidence" standard required by Superintendent v. Hill,  
 22 472 U.S. at 454. See id. (the relevant question is whether there is any evidence in the  
 23 record that could support the conclusion reached by the disciplinary board).

24 Accordingly, Defendant Carmichael's motion for summary judgment is  
 25 GRANTED, and Plaintiff's cross-motion for summary judgment is DENIED.

26           c.     Denial of administrative appeal

27 Plaintiff claims that Defendant Teresa Schwartz, an associate warden at PBSP,

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1 wrongly denied his appeal of the disciplinary hearing. A supervisor may be liable under  
 2 § 1983 upon a showing of (1) personal involvement in the constitutional deprivation or  
 3 (2) a sufficient causal connection between the supervisor's wrongful conduct and the  
 4 constitutional violation. Redman v. County of San Diego, 942 F.2d 1435, 1446 (9th Cir.  
 5 1991) (en banc) (citation omitted). A supervisor therefore generally "is only liable for  
 6 constitutional violations of his subordinates if the supervisor participated in or directed  
 7 the violations, or knew of the violations and failed to act to prevent them." Taylor v. List,  
 8 880 F.2d 1040, 1045 (9th Cir. 1989).

9       Here, the Court has found no constitutional violation occurred with respect to  
 10 Plaintiff's disciplinary hearing. Therefore, Defendant Schwartz's rejection of Plaintiff's  
 11 appeal did not amount to a violation of Plaintiff's constitutional rights.

12       Accordingly, Defendants Schwartz's motion for summary judgment is GRANTED,  
 13 and Plaintiff's cross-motion for summary judgment is DENIED.

14 D. Dental Care Claim

15 1. Facts

16       The following facts are undisputed unless otherwise noted.

17       On June 5, 2003 Plaintiff submitted an inmate administrative appeal (Log No.  
 18 PBSP -03-01578), in which he stated that "some two (2) months ago" he had submitted a  
 19 sick-call slip with respect to his lower left tooth, complaining that the filling had come out  
 20 and requesting an interview. In the appeal he complained that no action had been taken  
 21 since, causing more damage to the tooth. He also stated that he was supposed to be seen  
 22 for a dental "follow-up" visit to check on his tooth care and to be provided with a special  
 23 toothbrush. He stated that he should not have to wait until he was in an "emergency  
 24 status" to receive care. He requested a follow-up visit, that the issue of periodontal  
 25 disease be addressed, a "toothbrush remedy," and "dental replacements." (Defs.' Ex. A,  
 26 AGO 0022.)

27       On June 13, 2003 Defendant McLoughlin, a dental assistant, responded to the

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1 appeal as follows:

2 Regarding the first action requested, you are currently listed for routine  
3 dental treatment as per your request [for services form] (7362) stating,  
4 "filling came out, no real pain." Regarding the second action requested, the  
currently issued toothbrush has been deemed adequate to provide daily  
plaque removal.

5 (Id.)

6 On that same date, in response to Defendant McLoughlin's answer, Plaintiff filed a  
7 formal level appeal in which we wrote:

8 Of course when I put in the dental request I had no real pain and I thought it  
9 important to point it out, however 2 months has gone by and that's [sic] a  
different story. Also I have been evaluated previously by another dentist for  
10 [periodontal] disease. This person answering hasn't even examined my  
teeth & this tooth thing isn't adequate.

11 (Id.)

12 On June 18, 2003 Defendant Spencer, a dentist, interviewed and examined  
13 Plaintiff and then wrote a response to Plaintiff's formal level appeal, telling him that a  
14 special toothbrush had been ordered for his periodontal disease and that he had been  
15 scheduled to be seen in the dental clinic on June 19 to have his filling restored. (Defs.'  
16 Ex. A, AGO 0023.)

17 On June 19, 2003 Plaintiff received a filling for his tooth.

18 Additionally, Plaintiff alleges that at some point after Defendant McLoughlin's  
19 June 13, 2003 response but before Plaintiff's June 19, 2003 dental examination, Plaintiff  
20 was already at the medical clinic and asked the dentist, Dr. Hechanova if he could be seen  
21 that day. According to Plaintiff, Defendant McLoughlin intervened, saying that he was  
22 already on a list to be seen some other time, and Dr. Hechanova then said that Defendant  
23 McLoughlin had already cleaned the tools for the day and didn't want to work on any  
24 more patients. (Pl.'s Compl. at 3-E.)

25 Plaintiff alleges that the day after his tooth was filled he spoke to Defendant  
26 Spencer about getting treatment for his periodontal disease. According to Plaintiff,  
27 Defendant Spencer responded that there was no money in the budget to treat periodontal

1 disease, that once Plaintiff's tooth got loose it would just have to be extracted, and that  
2 dental work other than extractions, fillings, and minor tooth cleaning was not done at  
3 PBSP. (Id. at 3-F.)

4 On July 10, 2003, in response to Defendant Spencer's June 18, 2003 answer to  
5 Plaintiff's formal level appeal, Plaintiff filed a second level appeal, with the reasons stated  
6 as follows:

- 7 (1) No definite answer with respect to timely dental appointment,  
8 reasonable length of wait to be seen (2) Dental work which may be needed  
other than that which is offered at the institution if need be (added)  
9 (3) Budget which is dispensed for that purpose (if any).

10 (Defs.' Ex. A, AGO 0023.)

11 On July 29, 2003 Plaintiff received a second level appeal response from Defendant  
12 Winslow, the Health Care Manager at PBSP, who reviewed Plaintiff's complaints of delay  
13 and inadequate dental services. Defendant Winslow noted that in response to the process  
14 started by Plaintiff's June 5, 2003 appeal he had received an examination on June 18,  
15 2003 and had his tooth filled on June 19, 2003, and Defendant Winslow saw no delay in  
16 Plaintiff's treatment. Defendant Winslow told Plaintiff that if he needed additional dental  
17 work he should submit a request for services and he would be scheduled as soon as  
18 possible based on his dental needs. Defendant Winslow told Plaintiff that his request for  
19 a budget was beyond the scope of the appeals process. (Defs.' Ex. A, AGO 0028.)

20 On August 20, 2003 Plaintiff filed a third level appeal in which he stated that he  
21 was dissatisfied with Defendant Winslow's response and sought further review because:

22 The delay was when I submitted the actual medical form (CDC 7362) two  
23 (2) months previous which isn't disputed by Dr. Spencer's account and  
24 reasonable time to be seen without filling out a complaint (602 [form]) is  
what I sought. Also an answer to the denial of specific medical care on not  
the teeth in question that was filled, but the ones requiring more extensive  
work which may or may not be able to be done on site.

25 (Pl.'s Ex. F-301.)

26 This appeal was addressed by a Director's Level Appeal Decision dated November  
27 6, 2003, which found that Plaintiff had received the treatment he requested in his initial

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1 appeal, including follow-up treatment, and that the treatment was adequate and had not  
 2 been delayed. (Decl. of N. Grannis in Support of Defendants' Motion to Dismiss, Ex. B.)

3 Plaintiff's medical records show that after his tooth was filled on June 19, 2003 he  
 4 was not seen in the dental clinic again for treatment until May 13, 2004. (Defs.' Ex. A,  
 5 AGO 0034.)

6 In the present action, Plaintiff claims that Defendants McLoughlin, Spencer and  
 7 Winslow acted with deliberate indifference to his serious medical needs in violation of  
 8 the Eighth Amendment<sup>2</sup> because: (1) Defendant McLoughlin did not promptly respond to  
 9 his initial request for dental care and actively delayed his attempts to obtain treatment;  
 10 (2) Defendant Spencer acknowledged at his June 20, 2003 meeting with Plaintiff that  
 11 periodontal disease is serious and requires specialized care but he refused to allow such  
 12 care, employed no regular dentists for emergencies or routine dental services, did not  
 13 enforce rules requiring that dental care be provided as soon as possible, and did not  
 14 provide or make available prompt emergency dental care; and (3) Defendant Winslow  
 15 refused to provide adequate and specialized dental care for budgetary reasons.

16 2. Motion to Dismiss

17 In addition to moving for summary judgment with respect to Plaintiff's medical  
 18 claim Defendants move to dismiss the claim on the ground that Plaintiff has failed to  
 19 exhaust his administrative remedies as required by 42 U.S.C. § 1997e(a). The Prison  
 20 Litigation Reform Act of 1995 amended 42 U.S.C. § 1997e to provide that "[n]o action  
 21 shall be brought with respect to prison conditions under [42 U.S.C. § 1983], or any other  
 22 Federal law, by a prisoner confined in any jail, prison, or other correctional facility until  
 23 such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a).

24 The State of California provides its inmates and parolees the right to appeal

25  
 26 <sup>2</sup>Plaintiff also brings his claim under the Due Process Clause of the Fourteenth  
 27 Amendment. Because Plaintiff is a convicted prisoner, however, the claim must be brought  
 28 under the Eighth Amendment. See Estelle v. Gamble, 429 U.S. 97, 104 (1976). Accordingly,  
 Plaintiff's due process claim is DISMISSED.

1 administratively "any departmental decision, action, condition or policy perceived by  
 2 those individuals as adversely affecting their welfare." CCR§ 3084.1(a). In order to  
 3 exhaust available administrative remedies within this system, a prisoner must proceed  
 4 through several levels of appeal: (1) informal resolution, (2) formal written appeal on a  
 5 CDC 602 inmate appeal form, (3) second level appeal to the institution head or designee,  
 6 and (4) third level appeal to the Director of the California Department of Corrections. Id.  
 7 § 3084.5; Barry v. Ratelle, 985 F. Supp. 1235, 1237 (S.D. Cal. 1997). This satisfies the  
 8 administrative remedies exhaustion requirement under § 1997e(a). Id. at 1237-38.

9       It is undisputed that Plaintiff filed administrative appeals regarding inadequate  
 10 dental care through all levels of review. What is disputed is the nature of the appeals and  
 11 whether they addressed the issues raised in the present action. The Court has reviewed  
 12 Plaintiff's administrative appeals and the responses thereto, and has compared them to the  
 13 medical claims he raises in this action. The Court concludes that Plaintiff has exhausted  
 14 his administrative remedies with respect to his medical claims. Accordingly, Defendants'  
 15 motion to dismiss for failure to exhaust is DENIED.

16       3. Applicable Law

17       Deliberate indifference to serious medical needs violates the Eighth Amendment's  
 18 proscription against cruel and unusual punishment. See Estelle v. Gamble, 429 U.S. 97,  
 19 104 (1976); McGuckin v. Smith, 974 F.2d 1050, 1059 (9th Cir. 1992), overruled on other  
 20 grounds, WMX Technologies, Inc. v. Miller, 104 F.3d 1133, 1136 (9th Cir. 1997) (en  
 21 banc); see also Hunt v. Dental Dep't, 865 F.2d 198, 200 (9th Cir. 1989) (serious medical  
 22 needs can include serious dental needs). Whether the Eighth Amendment has been  
 23 violated in a particular situation involves an examination of two elements: the seriousness  
 24 of the prisoner's medical need and the nature of the defendant's response to that need. See  
 25 McGuckin, 974 F.2d at 1059.

26       A serious medical need exists if the failure to treat a prisoner's condition could  
 27 result in further significant injury or the "unnecessary and wanton infliction of pain." Id.

1 (citing Estelle, 429 U.S. at 104). The existence of an injury that a reasonable doctor or  
 2 patient would find important and worthy of comment or treatment, the presence of a  
 3 medical condition that significantly affects an individual's daily activities, or the existence  
 4 of chronic and substantial pain are examples of indications that a prisoner has a serious  
 5 need for medical treatment. Id. at 1059-60.

6 A prison official is deliberately indifferent if he knows that a prisoner faces a  
 7 substantial risk of serious harm and disregards that risk by failing to take reasonable steps  
 8 to abate it. Farmer v. Brennan, 511 U.S. 825, 837 (1994). In order for deliberate  
 9 indifference to be established, therefore, there must be a purposeful act or failure to act on  
 10 the part of the defendant and resulting harm. See McGuckin, 974 F.2d at 1060; Shapley  
 11 v. Nevada Bd. of State Prison Comm'rs, 766 F.2d 404, 407 (9th Cir. 1985).

12       4.     Analysis

13           a.     Defendant McLoughlin

14 Plaintiff alleges that Defendant McLoughlin's delay in responding to his first  
 15 request for dental care amounts to deliberate indifference. This claim is without merit. It  
 16 is undisputed that when Plaintiff sent in his first sick call slip some time around April 5,  
 17 2003 he stated that he had lost a filling but was not in pain. And it is undisputed that  
 18 upon receiving this request for care Defendant McLoughlin scheduled Plaintiff for  
 19 routine dental treatment. It is also undisputed that, between the time Plaintiff filed his  
 20 first request for care in April of 2003 and his first level appeal on June 13, 2003, he did  
 21 not make further facts known to Defendant McLoughlin which would have led her to  
 22 infer that he was suffering from a serious medical need. Even when viewed in the light  
 23 most favorable to him, the facts alleged by Plaintiff simply cannot support a finding that  
 24 he was suffering from a serious medical need when he first requested dental care for a  
 25 lost filling, that Defendant McLoughlin knew or should have known that a serious  
 26 medical need existed at the time of Plaintiff's first or second requests, or that she acted  
 27 with deliberate indifference to his serious medical needs. Delay in providing a prisoner

1 with dental treatment, standing alone, does not constitute an Eighth Amendment  
 2 violation. Hallett v. Morgan, 296 F.3d 732, 746 (9th Cir. 2002).

3 Plaintiff also alleges that after he made clear in his first level appeal that he was in  
 4 pain Defendant McLoughlin still did not arrange to provide him with immediate  
 5 treatment, as evidenced by her unwillingness to allow him to be seen by a dentist for an  
 6 unscheduled visit. This claim, too, is without merit. Within five days after Plaintiff filed  
 7 his first level appeal he was seen by Defendant Spencer. In the interim, Defendant  
 8 McLoughlin, a dental assistant, was under no obligation to allow Plaintiff to be seen  
 9 without an appointment. Her refusal to do so does not amount to deliberate indifference,  
 10 especially where Plaintiff has not demonstrated that he was suffering from a problem so  
 11 severe that Defendant McLoughlin's actions caused him significant harm. See id.

12 For these reasons, Defendant McLoughlin's motion for summary judgment is  
 13 GRANTED, and Plaintiff's cross-motion for summary judgment is DENIED.

14           b.     Defendant Spencer

15 Plaintiff alleges that Defendant Spencer acted with deliberate indifference because  
 16 he acknowledged at his June 20, 2003 meeting with Plaintiff that periodontal disease is  
 17 serious and requires specialized care but also refused Plaintiff's request for such care  
 18 because of budgetary concerns which did not allow for adequate staffing and treatment  
 19 methods at PBSP.

20 The failure to provide treatment because of a tight budget can amount to deliberate  
 21 indifference. See Jones v. Johnson, 781 F.2d at 769, 771 (9th Cir. 1986). Here, however,  
 22 Defendant Spencer did not fail to treat Plaintiff. The undisputed facts show that  
 23 Defendant Spencer was not employed at PBSP until 2003, and that he first saw Plaintiff  
 24 in the cell pod on February 28, 2003, when he responded to a request for services form.  
 25 Defendant Spencer noted that Plaintiff had pain, swelling and redness, and diagnosed a  
 26 dental abscess. He gave Plaintiff antibiotics and Motrin and scheduled him for a dental  
 27 appointment. (Defs.' Ex. A, AGO 0043.) On March 3, 2003 Defendant Spencer

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1 extracted Plaintiff's number twelve tooth because of advanced periodontitis. (Defs.' Ex.  
 2 A, AGO 0041.) On March 21, 2003 Plaintiff was seen by Dr. Hechanova, who extracted  
 3 Plaintiff's number six tooth, also because of advanced periodontitis. (Defs.' Ex. A, AGO  
 4 0040.) On June 19, 2003 Plaintiff had his filling replaced. On June 20, 2003 Plaintiff  
 5 alleges he spoke to Defendant Spencer about his ongoing treatment concerns. Plaintiff  
 6 was not seen for dental care again until May 12, 2004, on which date Defendant Spencer  
 7 advised Plaintiff that he needed to have his number five, seven, eight and nine teeth  
 8 extracted. Plaintiff refused. The next day, Plaintiff received a full-mouth scaling and a  
 9 prescription for vitamins C and D and calcium supplements. He also received a  
 10 periodontal charting. (Defs.' Ex. A, AGO 0037-0039.) On August 4, 2004 Defendant  
 11 Spencer renewed the prescriptions, and on August 17, 2004 Plaintiff's number seven and  
 12 eight teeth were extracted. (Defs. Ex. A, AGO 0034.) On August 24, 2004 and October  
 13 27, 2004 Plaintiff received dental checkups at which he was advised that his number five  
 14 and nine teeth needed to be extracted. Those teeth were extracted on December 8, 2004,  
 15 at which time Plaintiff was fitted for partial dentures. (Decl. of Dr. Spencer in Support of  
 16 Motion for Summary Judgment at 4:3-5.)

17 Because the undisputed facts show that Defendant Spencer did not fail to treat  
 18 Plaintiff, the question becomes whether the treatment he provided was acceptable under  
 19 Eighth Amendment standards. "A difference of opinion between a prisoner-patient and  
 20 prison medical authorities regarding treatment does not give rise to a § 1983 claim."  
 21 Franklin v. Oregon, 662 F.2d 1337, 1344 (9th Cir. 1981). And a showing of nothing  
 22 more than a difference of medical opinion as to the need to pursue one course of  
 23 treatment over another is insufficient, as a matter of law, to establish deliberate  
 24 indifference. See Toguchi v. Chung, 391 F.3d 1051, 1058-60 (9th Cir. 2004). In order to  
 25 prevail on a claim involving choices between alternative courses of treatment, a plaintiff  
 26 must show that the course of treatment the doctor chose was medically unacceptable  
 27 under the circumstances and that he chose this course in conscious disregard of an

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1 excessive risk to plaintiff's health. Id. at 1058.

2 This Plaintiff has not done. Even if, as Plaintiff alleges, Defendant Spencer  
 3 admitted to him that there were more specialized treatments available which PBSP could  
 4 not provide, this does not amount to a showing that the alternative treatment which  
 5 Defendant Spencer chose was medically unacceptable or was chosen in conscious  
 6 disregard of an excessive risk to Plaintiff's health. The record shows that Defendant  
 7 Spencer's mode of treatment was to provide prophylactic care in the form of tooth-  
 8 cleaning and scaling, prescription of dietary supplements, and a special toothbrush; to  
 9 provide palliative care in the form of antibiotics and Motrin for pain and swelling caused  
 10 by periodontitis; and to extract teeth when there was extensive bone loss or infection.  
 11 Although Plaintiff disagrees with the choice of treatment provided, he has not show that  
 12 such choice amounts to deliberate indifference. See, e.g., Hallett, 296 F.3d at 746  
 13 (upholding district court's finding of no Eighth Amendment violation where dentists did  
 14 not provide routine prophylactic treatment for patients with periodontal disease but could  
 15 refer them to a hygienist for tooth-cleaning and/or scaling in their discretion).

16 Even when Plaintiff's allegations are viewed in the light most favorable to him,  
 17 they do not raise a triable issue of fact with respect to whether Defendant Spencer acted  
 18 with deliberate indifference to Plaintiff's serious medical needs. Accordingly, Defendant  
 19 Spencer's motion for summary judgment is GRANTED, and Plaintiff's cross-motion for  
 20 summary judgment is DENIED.

21                   c.     Defendant Winslow

22 Plaintiff attempts to hold Defendant Winslow liable for the same failings attributed  
 23 to Defendant Spencer, that is, for refusing to provide adequate and specialized dental care  
 24 at PBSP for budgetary reasons. However, the Court has found no underlying  
 25 constitutional violation as the result of alleged inadequate dental treatment. Thus, there is  
 26 no ground on which to find Defendant Winslow liable for having violated Plaintiff's  
 27 constitutional rights. See Redman, 942 F.2d at 1446. Accordingly, Defendant Winslow's

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1 motion for summary judgment is GRANTED, and Plaintiff's cross-motion for summary  
2 judgment is DENIED.

3 E. Plaintiff's Pending Motions

4 Plaintiff has moved for an order compelling discovery, for the appointment of  
5 counsel, for the appointment of a medical expert, and for a stay of proceedings until  
6 discovery matters are resolved. The Court DENIES these motions. In ruling on  
7 Plaintiff's claims the Court has construed all facts in the light most favorable to Plaintiff  
8 and the discovery he seeks would have no bearing on the Court's legal rulings. Nor is  
9 Plaintiff entitled to the appointment of counsel or a medical expert. Because of this, a  
10 stay of proceedings is not required.

11 **CONCLUSION**

12 For the foregoing reasons the Court orders as follows:

13 1. Defendants' motion to dismiss for failure to exhaust administrative remedies is  
14 DENIED. (Docket no. 30.)

15 2. Defendants' motion for summary judgment is GRANTED. (Docket no. 30.)

16 3. Plaintiff's cross-motion for summary judgment is DENIED. (Docket no. 36.)

17 4. Plaintiff's motions to compel discovery, for the appointment of counsel, for the  
18 appointment of a medical expert, and to stay proceedings are DENIED. (Docket nos. 38,  
19 40, 42, 44.)

20 The Clerk of the Court shall enter judgment and close the file.

21 IT IS SO ORDERED.

22  
23 DATED: 9/25/06

/s/jeremy fogel  
24 JEREMY FOGEL  
United States District Judge

1 On \_\_\_\_\_, a copy of this order was mailed to  
2 the following:

3 Julius Roy Bragg  
4 D-35666  
5 Pelican Bay State Prison  
P.O. Box 7500/D1201L  
Crescent City, CA 95531

6 Trace O. Maiorino  
7 Deputy Attorney General  
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8 Suite 11000  
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